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No. _____

In The

Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

ERROL P. HOWERY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. This Court has held that 28 U.S.C. Section 1653 authorizes litigants to supplement defective jurisdictional allegations even as late as oral argument in the United States Supreme Court. Did the United States Court of Appeals for the Fifth Circuit – following the lead of some, but not all of the other circuit courts of appeals – err in refusing to allow Allstate Insurance Company to supplement defective jurisdictional allegations during proceedings in the court of appeals?

II. Is the one-year limitation on removal, 28 U.S.C. Section 1446(b), jurisdictional and not subject to waiver as some circuit courts of appeals have held, or is it procedural and therefore subject to waiver, as other circuit courts of appeals have held?

III. Did the Court of Appeals err in failing to apply the artful pleading doctrine to this case, which does not involve the complete preemption doctrine?

CORPORATE DISCLOSURE STATEMENT

Petitioner Allstate Insurance Company states that it is a wholly-owned subsidiary of The Allstate Corporation, which is a Delaware corporation. The stock of The Allstate Corporation is publicly traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit was issued on February 28, 2001, is set forth in the Appendix, App. 1, and is reported at 243 F.3d 912. The final judgment entered by the United States District Court for the Southern District of Texas, Houston Division, is unreported, was entered on July 21, 1999, and is set forth in the Appendix at App. 19. A timely petition for rehearing (after Allstate's motion for extension of time was granted by the court of appeals) was filed on March 16, 2001, and was denied on April 23, 2001 by the order set forth in the Appendix, App. 20.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1). The United States Court of Appeals for the Fifth Circuit issued its denial of Allstate Insurance Company's timely-filed petition for rehearing on April 23, 2001. Accordingly, this petition for a writ of certiorari was due to be filed on or before Monday, July 23, 2001. This Petition was timely filed on July 23, 2001, pursuant to the mailbox rule.

RELEVANT STATUTES INVOLVED IN THIS CASE

28 U.S.C. § 1653

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

28 U.S.C. § 1446(b) Second Paragraph

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year afer commencement of the action.

STATEMENT OF THE CASE

Errol Howery's home burned down. It was covered by a policy of homeowner's insurance issued by Allstate Insurance Company. Allstate performed an investigation into the cause of the fire. When Howery demanded payment from Allstate, it refused to pay, accusing Howery of having intentionally set or caused to be set the fire based upon the evidence discovered by fire investigators and its own investigation.

Howery filed suit in Texas state court. For the first two years of the litigation, Howery never pleaded a specific amount in controversy. Howery did not make any settlement demand or serve any paper suggesting he sought more than $75,000 in damages until he made a $1.5 million written settlement demand one year and one week after he served Allstate. More than two years after the lawsuit had been filed, and less than two weeks before trial, Howery amended his pleadings to include what appears to be a cause of action pursuant to a federal

statute – the Fair Credit Reporting Act ("FCRA"). As a result, Allstate removed the case to federal court on the asserted jurisdictional basis of a federal question.

Howery filed a motion to remand, which was timely overruled by Judge Harmon. The case proceeded to a jury trial on the merits. After a trial that spanned from June 7th to June 15th of 1999, the jury returned its verdict. *See* App. 19. The jury found that Errol Howery intentionally set or directed someone to set the fire that occurred around 2:00 a.m. on March 19, 1995 at his townhouse at 12239C Wildpine in Houston, Texas. *Id.* Accordingly, based upon the jury's verdict, on July 19, 1999, Judge Harmon signed a take-nothing judgment in favor of Allstate, and ordered that Howery pay all costs of court. *Id.*

Howery appealed the district court's take-nothing judgment. In his appeal, Howery raised two issues – first, that the district court did not have federal question jurisdiction over the case, and second, that the district court erred in failing to exercise its discretion to remand the case to state court.

After trial, and during the appellate process, Allstate changed counsel. As often happens when a fresh pair of eyes review an existing file, the new counsel for Allstate, Joseph F. Nistico, Jr., recognized for the first time that even if federal question jurisdiction were held not to have been present, federal jurisdiction based upon diversity of citizenship was present and supported by the record.

During oral argument, Mr. Nistico informed the court of appeals that based upon existing facts present in the district court record, jurisdiction was supportable under diversity of citizenship.

On February 28, 2001, the court of appeals issued its 17 page published opinion. The court of appeals found that the record did not support the existence of federal question jurisdiction. The court also found that diversity jurisdiction was not present because Allstate did not ***allege*** facts establishing diversity jurisdiction at the time judgment was entered. Opinion at App. 14 fn. 39. Finally, the court of appeals held that Allstate was only entitled to amend its jurisdictional allegations if it did so ***prior to entry of judgment.*** *Id.* Based upon these findings, the court of appeals vacated the district court's take-nothing final judgment, and remanded the case to the district court with instructions that it be dismissed due to lack of federal jurisdiction. Opinion at App. 17.

Allstate asked for and received a one-week extension of time to file its post-judgment briefing with the clerk of the court of appeals. On March 16, 2001, Allstate timely filed a petition for rehearing, a motion for leave to file amended notice and petition of removal, and a motion to supplement the record on appeal as to jurisdictional facts which existed at the time of the judgment.

In its petition for rehearing, Allstate advised the court of appeals that the record did indeed contain evidence that Allstate and Howery were citizens of different states, and that the amount in controversy was in excess of $75,000. That information was contained in the civil cover sheet which was part of the district court's file in the case. Allstate also directed the court of appeals to other documents in the district court's file which established or tended to establish that diversity of citizenship between Allstate and Howery existed at the time the

district court rendered its take-nothing final judgment in this case.

In its motion for leave to file amended notice and petition of removal, and in its amended notice and petition for removal itself, Allstate specifically stated that trial court jurisdiction was based upon both federal question and diversity of citizenship, alleging distinctly that Allstate and Howery were citizens of different states, and that the amount in controversy exceeded $75,000.

Finally, in its motion to supplement the record as to jurisdictional facts which existed at the time of judgment, Allstate included the sworn affidavit of Bruce Vest, a long-time Allstate employee. Mr. Vest's testimony established that Allstate is incorporated under the laws of the State of Illinois, that its nerve center is in the State of Illinois, and therefore, that its principal place of business is the State of Illinois. The record has always been clear that Howery is a resident of the State of Texas. Howery so stated in his original petition and every amended petition filed thereafter, both in state and federal court.

On April 23, 2001, the United States Court of Appeals for the Fifth Circuit issued an order overruling Allstate's motion for leave to file amended notice and petition of removal, its motion to supplement the record as to jurisdictional facts which existed at the time of judgment, and its petition for rehearing. *See* App. 20 and 23. The order contained the following language which forms the basis of this petition for certiorari: "There is a point at which the court must decline further opportunities to correct a patent jurisdictional defect. We have passed that point. As suggested by appellant, the remand to the district

court is with instruction that the case be remanded to the state court from which it was removed." App. 20.

Allstate timely filed this petition for certiorari ninety (90) days or less after the court of appeals overruled its timely-filed petition for rehearing on April 23, 2001.

REASONS FOR GRANTING THE WRIT

The court of appeals' stated rationale for overruling Allstate's petition for rehearing and other post-judgment motions is contrary to the letter and spirit of 28 U.S.C. § 1653, as well as several opinions of this Court and other circuit courts of appeals regarding late supplementation of the pleadings to establish district court jurisdiction. Unfortunately, other circuit courts of appeals have made errors similar to that of the Fifth Circuit in this case. Accordingly, this case provides the Court with an opportunity to unify federal jurisprudence with respect to the proper interpretation of 28 U.S.C. § 1653.

Additionally, in the event the court concludes that federal jurisdiction is otherwise present in this case, the issue of whether federal courts should recognize equitable exceptions to the one-year limitation on removals contained in 28 U.S.C. § 1446(b) is necessary to a complete analysis of this case. Once again, circuit courts of appeals have irreconcilably split as to whether section 1446(b) is jurisdictional or procedural, and therefore, several district courts have split as to whether to recognize equitable exceptions to the one-year limitation on

removal. This case provides the Court with an opportunity to provide guidance in order to resolve the split of authorities regarding this important issue.

Finally, the court of appeals, like other courts of appeals, declined to apply the artful pleading doctrine in determining whether there existed federal question jurisdiction over this case. This case presents the Court with an opportunity to provide guidance to subordinate appellate and district courts as to whether the artful pleading doctrine can be applied in determining the presence of federal question jurisdiction when the complete preemption doctrine is not involved.

If the court of appeals' rulings on federal question and diversity jurisdiction and supplementation of the record on appeal are permitted to stand, all of the time, effort and money expended by the district court, counsel for both parties, the parties themselves, and the witnesses, during the several day jury trial of this case will have been wasted.

ARGUMENT

I. This Court has held that 28 U.S.C. section 1653 authorizes litigants to supplement defective jurisdictional allegations even as late as oral argument in the United States Supreme Court. Did the United States Court of Appeals for the Fifth Circuit – following the lead of some but not all of the other circuit courts of appeals – err in refusing to allow Allstate Insurance Company to supplement defective jurisdictional allegations during proceedings in the court of appeals?

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653.

The court of appeals construed Section 1653 to mean that "if there is no evidence of diversity on the record, we cannot find diversity jurisdiction, and we must dismiss the action for lack of jurisdiction." Opinion at App. 13-14. Further, the court of appeals interpreted this Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), as requiring "that jurisdiction be established by the time judgment was entered." Opinion at App. 5. Finally, citing this Court's opinion in *Caterpillar, Inc. v. Lewis*, the court of appeals concluded that to avoid remand of the lawsuit to state court on jurisdictional grounds, Allstate was required, "at the very least, [to] have alleged facts prior to the entry of judgment in this case that establish federal subject-matter jurisdiction." Opinion at App. 5.

These holdings are incorrect, but are consistent with rulings of the Second Circuit in *Lupo v. Human Affairs Intern., Inc.*, 28 F.3d 269 (2nd Cir. 1994); the Eighth Circuit Court of Appeals in *Dubach v. Weitzel*, 135 F.3d 590 (8th Cir. 1998) and the Tenth Circuit Court of Appeals in *Sac & Fox Nation of Oklahoma v. Cuomo*, 193 F.3d 1162 (10th Cir. 1999), *cert. den.*, 530 U.S. 1229 (2000). The above-quoted rulings of the court of appeals in this case absolutely conflict with the holdings of this Court in *Chandler v. Miller*, 520 U.S. 305 (1997), and those of the Second Circuit Court of Appeals in *Jacobs v. Patent Enforcement Fund, Inc.*, 230 F.3d 565 (2nd Cir. 2000), the District of Columbia Circuit Court of Appeals in *Geico v. Fetisoff*, 958 F.2d 1137 (D.C. Cir. 1992), the Seventh Circuit Court of Appeals in *Stanley v. Amoco Oil Co.*, 965 F.2d 203 (7th Cir. 1992), and the Ninth Circuit in *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145 (9th Cir. 1998). Accordingly, this case presents the Court with an excellent opportunity to make uniform

the law of this country pertaining to supplementation of jurisdictional pleadings and evidence on appeal.

In *Lupo v. Human Affairs Intern., Inc.*, 28 F.3d 269 (2nd Cir. 1994), the defendant removed on the basis of federal question jurisdiction. The court of appeals disagreed that federal question jurisdiction existed. In the court of appeals, the defendant argued that diversity jurisdiction also existed, even though the face of the appellate record did not establish it. The defendant sought leave to amend the jurisdictional pleadings to satisfy the court of appeals that diversity jurisdiction existed between the parties at the time the district court rendered its judgment. The court of appeals refused to permit such supplementation, holding that if jurisdiction was not readily apparent from the face of the record as it existed in the district court, then the district court did not have jurisdiction to hear the case. *Lupo*, 28 F.3d at 273. The defendant also asked the court of appeals to remand the case to the district court so that it could present pleadings and evidence to establish that diversity jurisdiction was present in the case. Once again, the court of appeals refused, citing the same reason it would not permit supplementation of the appellate record to establish the presence of diversity jurisdiction. *Lupo*, 28 F.3d at 274.

In *Dubach v. Weitzel*, 135 F.3d 590 (8th Cir. 1998), the district court dismissed shareholder derivative claims for lack of jurisdiction. On appeal, the dismissed parties sought the court of appeals' permission to amend their pleadings pursuant to 28 U.S.C. § 1653 in order to properly allege diversity jurisdiction. The court of appeals held that relief under section 1653 was only available if the dismissed parties paid the attorneys fees and

expenses incurred by the opposing party due to the dismissed parties' late revision of their jurisdictional pleadings. Upon the dismissed parties' refusal to pay such fees and expenses, the Eighth Circuit Court of Appeals affirmed the district court's dismissal of their lawsuit. *Dubach*, 135 F.3d at 593.

In *Sac & Fox Nation of Oklahoma v. Cuomo*, 193 F.3d 1162 (10th Cir. 1999), *cert. den.*, 530 U.S. 1229 (2000), the district court dismissed the plaintiffs' lawsuit on the ground of no federal question jurisdiction. On appeal, in their appellate briefing, the plaintiffs attempted to flesh out their pleadings to more accurately state a claim arising under federal law. The Tenth Circuit Court of Appeals declined "to construe plaintiffs' appellate brief as an amendment of their complaint." *Sac & Fox*, 193 F.3d at 1167. In applying an earlier Tenth Circuit case[1] to the facts at hand, the Tenth Circuit held that the plaintiffs were not entitled to amend their jurisdictional pleadings because the specifics of their federal claims were not argued for the first time until the plaintiffs filed their reply brief in the court of appeals, and even then, it was raised in a footnote. The court's stated rationale for disallowing amendment of the plaintiffs' jurisdictional allegations was that any other ruling "would unfairly prejudice the federal defendants because they would have no practical opportunity to respond to the jurisdictional allegations made by [the plaintiffs]". *Sac & Fox*, 193 F.3d at 1167-68.

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[1] *Martinez v. United States Olympic Comm.*, 802 F.2d 1275 (10th Cir. 1986).

While the Eighth and Tenth Circuit Court of Appeals' decisions in *Dubach* and *Sac & Fox* may have some measure of intellectual appeal, the fact of the matter is that they are foreclosed by this Court's 8-1 decision[2] in *Chandler v. Miller*, 520 U.S. 305 (1997).

In *Chandler*, a candidate for high office in the State of Georgia brought an action challenging the constitutionality of a state statute requiring candidates to submit to and pass a drug test to qualify for state office. *Id.* at 308. The district court and the court of appeals all denied the candidate any relief, holding that the statute in question was constitutional. *Id.* This Court granted review and held that the statute in question was an unconstitutional violation of the Fourth Amendment to the United States Constitution. *Id.*

Of particular interest in this case, in *Chandler*, the United States, as *amicus curiae*, argued that the case was moot because the election in question was over and the record before the Court from the district court and the circuit court of appeals contained neither evidence nor pleadings to support the notion that he intended to run for a state office covered by the statute in question in a future election. *Id.* at 313, fn. 2. The Court rejected the United States' contention of mootness, which is, of course, a doctrine addressing federal courts' jurisdiction

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[2] Rehnquist, C.J., dissenting.

under Article III of the United States Constitution.[3] In doing so, the Court stated as follows:

> We reject the suggestion of mootness. Petitioner Chandler represented, as an officer of this Court, that he plans to run again, and counsel for the State does not contest that representation. See Tr. of Oral Arg. 4-6, 27; see also 28 U.S.C. § 1653 (defective allegations of jurisdiction curable by amendment at trial or in appellate stages).

Chandler, 528 U.S. 313, fn. 2.

Thus, the Court held in *Chandler* that despite the fact that the plaintiff failed to properly allege and present evidence to establish jurisdiction in the district court, in the circuit court briefing, in the circuit court oral arguments, in the circuit court post-judgment briefing, in the petition for certiorari to this Court, and in the briefing to this Court, it was still not too late for Chandler to present evidence to support jurisdiction during oral arguments before this Honorable Court. Based upon this Court's ruling in *Chandler*, how could Allstate possibly have waived its right under 28 U.S.C. § 1653 to amend its jurisdictional allegations and present evidence to support diversity jurisdiction during oral argument and in its post-judgment briefing?

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[3] "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70 (1983) *citing DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704, 1705, 40 L.Ed.2d 164 (1974).

If this Court's pronouncement in *Chandler* less than half a decade ago is still good law, then, respectfully, the Fifth Circuit must have erred when it held that Allstate waived federal jurisdiction by failing to assert diversity as a jurisdictional basis until oral argument in the court of appeals. It also must have erred when it refused Allstate the right to supplement the pleadings and evidence to demonstrate the presence of diversity jurisdiction at the time of removal and at the time the district court entered its take-nothing judgment in favor of Allstate after a weeklong jury trial on the merits of the case.

The foregoing argument is particularly true in light of this Court's clearly-stated policy of seeking to uphold jurisdiction in diversity cases that have been fully tried in federal court:

> Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), considerations of finality, efficiency, and economy become overwhelming.

Caterpillar, Inc. v. Lewis, 519 U.S. at 75.

> To permit a case in which there is complete diversity throughout trial to proceed to judgment and then cancel the effect of that judgment and relegate the parties to a new trial in a state court because of a brief lack of complete diversity at the beginning of the case would be a waste of judicial resources.

Id. at 76.

> To wipe out the adjudication postjudgment, and return to state court a case now satisfying

> all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

Id. at 77.

Even amongst the federal circuit courts of appeals that have ruled in a manner compatible with *Chandler*, there is sharp disagreement regarding whether and when to permit appellate supplementation of the pleadings and record to establish the presence of jurisdiction at the time the trial court signed the final judgment, and what the proper remedy is if such supplementation establishes the presence of diversity jurisdiction.

In *Jacobs v. Patent Enforcement Fund, Inc.*, 230 F.3d 565 (2nd Cir. 2000), a default judgment had been entered by the district court. On appeal, the Second Circuit Court of Appeals, *nostra sponte*, determined that the plaintiffs had failed to adequately allege diversity in their original complaint. Pursuant to 28 U.S.C. § 1653, the court of appeals requested supplemental briefing to establish whether diversity existed between all plaintiffs and all defendants. *Id.* at 567. Satisfied that the briefing adequately established diversity at the time of judgment, the Second Circuit Court of Appeals proceeded to adjudicate the merits of the appeal.

In *Stanley v. Amoco Oil Co.*, 965 F.2d 203 (7th Cir. 1992), the district court entered a summary judgment in favor of Amoco. Stanley appealed. Trial court jurisdiction was based upon diversity of citizenship. Appellant and appellee both failed to state Amoco's principal place of business either in the trial court pleadings and motions or

in the appellate court briefing. The court of appeals ordered both litigants to supplement the briefing as to Amoco's principal place of business. Incredibly, both parties failed to do so. *Id.* at 204. Despite the parties' failure to respond, the Seventh Circuit essentially took judicial notice of the fact that Amoco's corporate headquarters is located in the State of Illinois:

> [T]he consequence of dismissal for failure to supply this in the proper form would be a refiling and more litigation, in either state or federal court (as we know from other sources that Amoco's corporate headquarters is indeed in Illinois). These lawyers, inexcusably nonchalant about jurisdiction, have already diverted enough time from other litigants' cases to their own. Lest they squander more, we proceed to the merits.

Stanley v. Amoco Oil Co., 965 F.2d 203, 204 (7th Cir. 1992).

Thus, not only did the Seventh Circuit permit a litigant to supplement the record in order to jurisdictionally salvage a district court adjudication, when the litigant failed to properly supplement, the district court preserved trial court jurisdiction by taking judicial notice of an essential jurisdictional fact.

In *Geico v. Fetisoff*, 958 F.2d 1137 (D.C. Cir. 1992), the district court granted the defendant's motion for summary judgment. District court jurisdiction was predicated upon diversity of citizenship. However, GEICO pleaded that it was a citizen of the District of Columbia, as was Fetisoff. Neither party brought the problem to the district court's attention, and the district court failed to notice the jurisdictional problem.

On appeal, the Court of Appeals for the District of Columbia Circuit, *sua sponte*, raised the jurisdictional problem and directed the parties to address it at oral argument. During argument, counsel for GEICO admitted that he had discovered GEICO is actually a citizen of Maryland, and therefore, complete diversity did exist at the time of judgment. *Id.* at 282. At the court of appeals' direction, GEICO submitted an affidavit establishing that fact under oath. *Id.* Despite the factual misrepresentation of GEICO's counsel as to his own client's state of citizenship, the court of appeals granted GEICO's motion to amend jurisdictional pleadings in the court of appeals and proceeded to affirm the judgment of the district court on the merits. *Id.*

In *Garcia v. Bernabe*, 288 F.2d 60 (1st Cir. 1961), the district court dismissed the lawsuit, but not because of lack of diversity of citizenship. The First Court of Appeals determined that it appeared that diversity jurisdiction had been lacking in the district court. After full briefing, the court of appeals issued an order giving the parties 20 days to file a motion for leave to amend jurisdictional allegations pursuant to 28 U.S.C. § 1653. If the motion was filed and granted, then the court of appeals would proceed to rule on the merits of the dispute. Otherwise, the court of appeals stated that it would direct the district court to enter an order dismissing the complaint for lack of jurisdiction. *Id.* at 61.

Curiously, less than one year prior to the Fifth Circuit's issuance of its opinion in this case, a different panel of the Fifth Circuit Court of Appeals addressed a similar

issue regarding supplementation of jurisdictional pleadings, this time reaching a conclusion that properly comported with this Court's opinion and judgment in *Chandler, infra.*

In *Whitmire v. Victus Limited T/A Master Design Furniture*, 212 F.3d 885 (5th Cir. 2000), the district court denied the plaintiff's motion for leave to amend her complaint to assert diversity jurisdiction. The court of appeals held that the district court abused its discretion by overruling the plaintiff's motion to amend jurisdictional facts, in relevant part, as follows:

> There can be no question that allowing Whitmire to cure her jurisdictional defect by stating the requisite facts showing that diversity jurisdiction exists as an alternative basis for subject matter jurisdiction would not create jurisdiction where it did not previously exist. Having determined that § 1653 is the proper tool to employ in this situation and that the district court was authorized by statute to allow such an amendment, we now address whether the district court committed an abuse of discretion when it denied Whitmire's motion for leave to amend.
>
> . . . .
>
> In the instant case, diversity jurisdiction existed at the time Whitmire filed suit in district court and was not destroyed by any subsequent amendment. . . .

Whitmire, 212 F.3d at 888-89.

The Fifth Circuit concluded that the district court abused its discretion by refusing Whitmire permission to

amend her jurisdictional allegations and present additional jurisdictional facts. *Id.* at 889-90. *See also Illinois Cen. Gulf R. Co. v. Pargas, Inc.*, 706 F.2d 633 (5th Cir. 1983) (federal question jurisdiction erroneously claimed by plaintiff. On appeal, plaintiff attempted to allege diversity jurisdiction. Fifth Circuit Court of Appeals remanded the case to the district court to hear facts in support of and against diversity jurisdiction, in an effort to determine whether diversity jurisdiction was supportable).

The bottom line is that some circuit courts of appeals, like the Fifth Circuit in this case, deny litigants the opportunity to supplement jurisdictional facts and pleadings in the appellate court in violation of 28 U.S.C. § 1653. This Court, as well as several other circuit courts of appeals, permits liberal supplementation of jurisdictional facts and pleadings in the appellate court, especially where, as here, the case has proceeded through a jury trial to judgment on the merits. Amongst the courts that permit such supplementation, there is no uniformity as to the procedure followed. Some require the parties to provide the supplementation, some judicially notice jurisdictional facts, and some remand the cause to the district court for the taking of additional evidence and pleadings on the issue of the presence or absence of trial court jurisdiction.

This case presents the Court with an opportunity to resolve the conflicts between and amongst the various circuit courts of appeals on this important procedural issue.[4]

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[4] One remaining possible outcome of this petition for certiorari is that the Court could recognize that the

II. Is the one-year limitation on removal, 28 U.S.C. section 1446(b), jurisdictional and not subject to waiver as some circuit courts of appeals have held, or is it procedural and therefore subject to waiver, as other circuit courts of appeals have held?

Resolution of the first question presented for review does not necessarily end the Court's inquiry in this case. This is so because while Allstate removed the case to federal court within the thirty days prescribed by the first paragraph of 28 U.S.C. § 1446(b), it removed the case more than one year after it had been filed, possibly in derogation of the second paragraph of 28 U.S.C. § 1446(b). Why did Allstate wait so long to remove?

Neither in pleadings nor in any communications of any type did Howery ever indicate an amount in controversy in this lawsuit until his attorney sent a $1.5 million settlement demand *coincidentally or not* approximately one week after the one-year anniversary of Allstate having been served with the suit papers. Consequently, the case was not removable on the basis of diversity until Howery finally made the demand in excess of the $75,000 minimum jurisdictional limits for diversity lawsuits. By that time, if 28 U.S.C. § 1446(b)'s one-year bar is determined to be jurisdictional, it was too late for Allstate to remove to federal court. If the one-year bar is considered to be procedural, and therefore subject to equitable defenses, then Allstate's removal was appropriate when it

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jurisdictional facts present in the civil cover sheet are sufficient that the court of appeals should have concluded that diversity jurisdiction was properly established. *See, e.g., Bryant v. Cruises, Inc.*, 6 F.Supp.2d 1314, 1317 (N.D. Ala. 1998).

occurred. The problem is that a split exists amongst the circuits that have addressed this issue. That split is so great on an issue that is so important that just last year, a commentator in a well-respected legal journal asked this Court to decide the issue once and for all.

In *Brock v. Syntex Laboratories, Inc.*, 791 F.Supp. 721 (E.D. Tenn. 1992), *aff'd*, 7 F.3d 232 (6th Cir. 1993), the plaintiffs demanded $10,000 in damages during the 10 years that the lawsuit had been pending in state court. Shortly after the one-year limitation on removal was enacted, plaintiffs increased their demand to $5 million. Defendants removed to federal court. Plaintiffs argued that the one-year bar on removal was jurisdictional, and therefore, absolute. Accordingly, defendants should have been prevented from removing despite any appearance that the plaintiffs had played games with their allegations of and prayer for damages. The district court and court of appeals agreed, holding that the one-year limitation on removal in 28 U.S.C. § 1446(b) is jurisdictional, and therefore not subject to any equitable defenses.

In contrast, in *Barnes v. Westinghouse Electric Corp.*, 962 F.2d 513 (5th Cir. 1992), *cert. den.*, 506 U.S. 999 (1992), the Fifth Circuit Court of Appeals held that the one-year limitation on removal contained in 28 U.S.C. § 1446(b) is procedural rather than jurisdictional, and therefore, is subject to being waived by a plaintiff who fails to assert that ground for remand within thirty (30) days of removal. *Barnes*, 962 F.2d at 516.

The Fifth Circuit in *Barnes* and the Sixth Circuit in *Brock* cannot both be correct. The one-year limitation on

removal contained in 28 U.S.C. § 1446(b) is either jurisdictional or procedural, but it cannot be both.

To complicate matters, several different district courts have reached varying conclusions regarding the availability of equitable defenses to the one-year limitation on removal depending upon whether they followed *Barnes* or *Brock*. *See, e.g., Foiles v. Merrell Nat'l Labs.*, 730 F.Supp. 108, 110 (N.D. Ill. 1989) (one-year limitation is jurisdictional and not subject to equitable exceptions); *Marine Midland Bank v. Bravo*, 2000 WL 175132 (E.D. Pa. 2000) (same); *Green Point Svgs. Bank v. Hidalgo*, 910 F.Supp. 89 (E.D. N.Y. 1995), *dism'd*, 104 F.3d 351 (2nd Cir. 1996) (same); *Smith v. MBL Life Assurance Corp.*, 727 F.Supp. 601 (N.D. Ala. 1989) (same); *Jenkins v. Sandoz Pharmaceuticals Corp.*, 965 F.Supp. 861, 869 (N.D. Miss. 1997) (same); *Russaw v. Voyager Life Ins. Co.*, 921 F.Supp. 723, 724-25 (N.D. Ala. 1996) (same); *Hedges v. Hedges Gauging Svc., Inc.*, 837 F.Supp. 753, 755 (M.D. La. 1993) (same); *Cofer v. Horsehead Research and Dev. Co.*, 805 F.Supp. 541, 544 (E.D. Tenn. 1991) (same). *Contra Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1117 (5th Cir. 1998) (one-year removal bar in section 1446(b) is procedural and not jurisdictional); *Ferguson v. Security Life of Denver Ins. Co.*, 996 F.Supp. 597, 603 (N.D. Tex. 1998), *aff'd*, 162 F.3d 1160 (5th Cir. 1998) (the one-year bar on removal in section 1446(b) is procedural and therefore subject to equitable defenses); *Kinabrew v. Emco-Wheaton*, 936 F.Supp. 351, 353 (M.D. La. 1996) (same); *Morrison v. National Benefit Life Ins. Co.*, 889 F.Supp. 945, 950-51 (S.D. Miss. 1995) (same); *Leidolf by Warshafsky v. Eli Lilly and Co.*, 728 F.Supp. 1383, 1388 (E.D. Wis. 1990) (same); *Gray v. Moore Business Forms*, 711 F.Supp. 543 (N.D. Cal. 1989).

This issue has caused so much confusion that even the same court has issued diametrically opposite results. *Compare Kinabrew*, 936 F.Supp at 353 *with Hedges*, 837 F.Supp. at 755.

One commentator from a well-respected legal journal has noted the conflict discussed in this section of the petition and has specifically and respectfully asked this Court for guidance as to the correct interpretation of the one-year limitation on removal in section 1446(b). Yosef Rothstein, *Ask Not for Whom the Bell Tolls: How Federal Courts Have Ignored the Knock on the Forum Selection Door Since Congress Amended Section 1446(b)*, 33 Colum. J.L. & Soc. Probs. 181, 233-34 (2000). Mr. Rothstein concludes:

> As the Barnes court suggests, the one-year limit should not be read as a simple issue of subject matter jurisdiction nor procedural jurisdiction, but rather as an additional curiosity of "removal jurisdiction." fn. 336. The one-year limit remains an issue of confusion amongst the circuit and district courts. Therefore, "[u]ntil the point is resolved either by the United States Supreme Court in a decision or by Congress in a legislative clarification," fn. 337, plaintiffs and defendants will not be able to determine whether removal or remand is appropriate.
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> . . . .
>
> Congress intended to create a fair and equitable solution in which the proper forum is selected in a timely manner. Courts, in the end, cannot accept delay and trickery by either the plaintiffs or the defendants. Otherwise, forum manipulation will haunt our justice system and violate the concept of comity.

Id.

This case presents an opportunity for the Court to clarify a problem that is continuing to confuse circuit courts and district courts alike across the United States.

III. Did the Court of Appeals err in failing to apply the artful pleading doctrine to this case, which does not involve the complete preemption doctrine?

Several circuit courts use the artful pleading doctrine to find federal question jurisdiction when the plaintiff disguises its federal claims by labeling them as state law causes of action. Howery engaged in such artful pleading by pursuing a Fair Credit Reporting Act ("FCRA") claim under the guise of the Texas' Deceptive Trade Practices Act ("DTPA"). Federal courts usually use the artful pleading doctrine where federal law completely preempts a plaintiff's state law claims. *Id.* However, several courts also employ the artful pleading doctrine in concluding that allegations in state court complaints assert removable federal questions even where there is no complete preemption.

In the Second, Sixth, Seventh and Ninth Circuits, the artful pleading doctrine applies to cases that do not involve complete preemption. These courts recognize that a plaintiff cannot avoid removal jurisdiction through artful pleading. *See Arco Environmental Remediation, L.L.C. v. Dep't of Health and Environmental Quality of the State of Montana,* 213 F.3d 1108, 1114 (9th Cir. 2000); *Marcus v. AT & T Corp.,* 138 F.3d 46, 55-56 (2nd Cir. 1998); *Brennan v. Southwest Airlines Co.,* 134 F.3d 1405, 1408 (9th Cir. 1998)

(plaintiffs articulated an inherently federal tax refund suit in state-law terms); *Sable v. General Motors Corp.*, 90 F.3d 171, 174 (6th Cir. 1996); *Rains v. Criterion Systems, Inc.*, 80 F.3d 339 (9th Cir. 1996) (artfully pleaded state law claim may be re-characterized as a federal claim by the court to which it is removed); *People of the State of Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d 571 (7th Cir. 1982) (defendant entitled to removal if plaintiff is attempting to avoid having an essentially federal claim adjudicated in a federal forum by artfully drafting the complaint in terms of state law).

The Fifth and First Circuits, however, limit the artful pleading doctrine to complete preemption cases. In *Waste Control Specialists, L.L.C. v. Envirocare of Texas, Inc.*, the Fifth Circuit held that "Without complete preemption, the artful pleading doctrine does not apply." 199 F.3d 781, 783 (5th Cir. 2000, part IV of opinion withdrawn and substituted on panel rehearing, 207 F.3d 225). The Fifth Circuit reached this conclusion by incorrectly treating this Court's decisions in *Rivet v. Regions Bank of Louisiana* and *Caterpillar v. Williams* as if they do not allow use of the artful pleading doctrine without complete preemption. 522 U.S. 470, 475 (1998) and 482 U.S. 386, 397 fn. 11 (1987), *cited in Envirocare*, 199 F.3d at 783. Additionally, the First Circuit defined the artful pleading doctrine as if it only applies in situations involving complete preemption in *BIW Deceived v. Local S6, Industrial Union of Marine and Shipbuilding Workers of America, IAMAW District 4 Lodge*, 132 F.3d 824, 832 (1st Cir. 1997).

Here, Howery seeks a remedy for the violation of the FCRA, which provides a private cause of action. However, the Fifth Circuit treated Howery's FCRA claim as an alternative basis for recovery under the DTPA, despite the fact that: 1) Howery alleged an FCRA violation with sufficient specificity to be entitled to a jury question based solely on a federally-created private cause of action; and 2) the FCRA could not legally be used as an element of a DTPA claim. *See* Opinion at App. 10 fn. 25 and 26.

In his Tenth Amended Complaint in state court, Howery claimed that Allstate "engaged in conduct in violation of the Federal Trade Commission rules, regulations, and statutes by obtaining Plaintiff's credit report in a prohibited manner, a further violation of the Texas Deceptive Trade Practices Act." The FCRA provides the only known civil remedy for plaintiffs who contend their credit reports are obtained in a manner prohibited by Federal Trade Commission rules, regulations and statutes. 15 U.S.C. § 1681b and 1681n; *Hansen v. Morgan*, 582 F.2d 1214, 1219-20 (9th Cir. 1978); *Popik v. American Int'l Mortgage Co.*, 936 F.Supp. 173 (S.D.N.Y. 1996); *Boothe v. TRW Credit Data*, 557 F.Supp. 66, 71 (S.D.N.Y. 1982).

Allstate contends that the artful pleading doctrine applies to Howery's claim because he vaguely asserts a federal claim under the guise of a state tort claim. Where the plaintiff's artfulness comes in the form of a vague reference to a federal statute or cause of action, the complaint is simply not well-pleaded. Therefore, it is appropriate for the court to use logic to determine what the poorly-pled complaint alleges. *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 809 (5th Cir. 1992) (recognizing the

court may "reconstruct the plaintiff's legal theories" to interpret the plaintiff's pleadings for jurisdictional purposes, while not specifically referring to the "artful pleading" doctrine); *Charles D. Bonanno Linen Service, Inc. v. McCarthy*, 708 F.2d 1, 3 (1st Cir.), *cert. den.*, 646 U.S. 936 (1983).

A violation of the FCRA could not legally satisfy an element under the DTPA. *See* Opinion at App. 9-10 fn. 25 and 26. Therefore, it takes very little of the same "statutory logic" used in *Bonanno Linen Service* and *Aquafaith* to identify Howery's allegation as a federal claim. This federal claim, though disguised as part of a DTPA claim, carried all the requirements for a federal question. It was created by a federal statute which provides a private cause of action. *See* 15 U.S.C. § 1681b and 1681n. The federal statute, the FCRA, provides for federal jurisdiction over claims and has been held to support removal jurisdiction.[5]

The Fifth Circuit's holding does more than perpetuate the fiction that Howery's allegation merely supported his state law claim. It also places plaintiffs in position to take advantage of liberal notice pleading rules. Had Allstate not removed Howery's suit, then he would have been entitled to a separate jury issue in state court on his vaguely-pleaded FCRA claim. This result emasculates the

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[5] *See* 15 U.S.C. § 1681p; *Rhea v. Ameresco, Inc.*, 871 F.Supp. 283, 284 (N.D. Tex. 1994); *Broom v. TRW Credit Data*, 732 F.Supp. 66, 69 (E.D. Mich. 1990) ("Nothing in the FCRA's legislative history indicates an intent to limit the right of removal granted under 28 U.S.C. § 1441.").

artful pleading doctrine established to maintain the integrity of removal jurisdiction against artfully-vague assertions of federal claims.

The fact that Howery labeled his FCRA claim as "a further violation of the DTPA" should not change the claim's federal character. To allow jurisdiction to be artfully manipulated through such vague pleading promotes form over substance and sponsors forum manipulation. This Court should allow federal courts to prevent jurisdictional gamesmanship by recognizing that federal jurisdiction can arise under the artful pleading doctrine even where there is no complete preemption.

CONCLUSION

This case presents three important procedural issues over which circuit courts of appeals and district courts throughout the United States have reached conflicting resolutions. This case offers the Court an opportunity to resolve these conflicts, returning a measure of certainty to otherwise uncertain issues pertaining to appellate supplementation of jurisdictional pleadings and evidence, removal, and the artful pleading doctrine.

Allstate Insurance Company respectfully prays that this Court grant certiorari to review the important substantive and procedural issues raised in this petition, and in doing so, reverse the judgment of the Fifth Circuit and order this case back to district court so that the district court can determine whether Howery's delay in asserting his multimillion dollar damage claim warrants equitable intervention in the form of denial of his motion to

remand, or alternatively, for the Court to reverse the judgment of the court of appeals and to affirm the judgment of the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX A – Circuit Court Opinion and Judgment .....App. 1

APPENDIX B – Final Judgment of the District Court.....App. 19

APPENDIX C – Circuit Court's Order Denying Petitions for Rehearing.....App. 20

APPENDIX D – Circuit Court's Order Denying Allstate's Motion to Supplement the Record to the Extent that it Includes Material not Presented to the District Court.....App. 22

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20878

ERROL P. HOWERY,

Plaintiff-Appellant,

versus

ALLSTATE INSURANCE CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before KING, Chief Judge, and HIGGINBOTHAM and DUHÉ, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Errol Howery's home burned down. When he demanded payment from his insurer, Allstate Insurance Company, it refused, accusing him of arson. Howery filed suit in Texas state court. After more than two years, as the case was approaching trial, Allstate removed this case to federal court, asserting federal question jurisdiction. The district court denied Howery's motion to remand. After another year of litigation in federal court, a jury agreed with Allstate.

Howery appealed, challenging federal subject-matter jurisdiction and the district court's refusal to remand. Because Howery's complaint does not raise a federal question and the record fails to establish diversity of the parties, we vacate the judgment of the district court and remand with instructions to dismiss for lack of jurisdiction.

I

A

Errol Howery owned a townhome that he insured against fire with Allstate Insurance Company. When Howery's home burned down, he filed a claim with Allstate. Allstate refused to pay, convinced that Howery had committed arson.

On March 5, 1996, Howery filed suit against Allstate in a state court of general jurisdiction in Texas. During the next two and a half years, Howery filed ten amended complaints. Only in the last was there any reference to federal law. In his Tenth Amended Complaint, which he filed August 11, 1998, Howery mentioned for the first time "Federal Trade Commission rules, regulations, and statutes."

Allstate filed a notice of removal on August 20, 1998, asserting that Howery's complaint raised a federal question. Allstate did not allege the existence of diversity jurisdiction nor state the citizenship of the parties.[1] The

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[1] Allstate alleged that the case was "not removable as originally filed" – thereby disclaiming the existence of diversity.

case was removed to the United States District Court for the Southern District of Texas. After Howery deleted the reference to federal law in his complaint, he moved for remand, which the district court denied. The court also denied Howery's subsequent motion to amend his complaint to add federal claims.

The case proceeded on Howery's claim of bad faith denial of insurance coverage and breach of contract. The court granted summary judgment for Allstate on the bad faith claim, and after trial a jury sustained Allstate's defense of arson. The court entered judgment against Howery.

Howery filed an appeal of the judgment on September 3, 1999. Howery argued that there was no federal question, and thus no jurisdiction; he further argued that the district court abused its discretion in refusing to remand the case to state court. Briefing of the appeal was completed almost a year later, and oral arguments were scheduled for January 8, 2001. At oral argument, counsel for Allstate raised for the first time the issue of diversity jurisdiction.

B

Howery's tenth amended complaint is the center of the dispute over federal question jurisdiction. It alleged, in relevant part:

> The acts, omissions, and other wrongful conduct of Allstate complained of in this petition constituted unconscionable conduct or unconscionable course of conduct, and false, misleading, or deceptive acts or practices. As such, Allstate

> violated the Texas Deceptive Trade Practices Act, Sections 17.46, et seq., and the Texas Insurance Code, including articles 21.21, 21.21-1, 21.55, and the rules and regulations promulgated thereunder, specifically including 28 TAC Section 21.3, et seq. and 21.203.
>
> . . .
>
> Allstate's destruction of [Howery's] file . . . constituted a further violation of the Texas Deceptive Trade Practices Act, for which plaintiff sues for recovery. Allstate also engaged in conduct in violation of the Federal Trade Commission rules, regulations, and statutes by obtaining Plaintiff's credit report in a prohibited manner, a further violation of the Texas Deceptive Trade Practices Act. . . .
>
> As a further basis for this claim and further evidencing Allstate's statutory and common law violations, Howery would show that Allstate has sought to profit from its denial of his claim.

The complaint does not contain allegations of diversity or lack of diversity. It states that Howery is a citizen of Texas, but does not allege the citizenship of Allstate.

II

Federal courts are courts of limited jurisdiction.[2] We must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction

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[2] *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

rests on the party seeking the federal forum.[3] In this case, Allstate invoked the jurisdiction of the federal courts by removing Howery's state court case to federal court. Allstate must prove that federal jurisdiction existed at the time of removal,[4] or, at the very least, have alleged facts prior to the entry of judgment in this case that establish federal subject-matter jurisdiction.[5] Without the presence of such facts in the record, a federal court does not have jurisdiction over the case.[6]

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[3] *Id.; see also Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991) ("The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction.") (quoting *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1259 (5th Cir. 1988)).

[4] *See Texas Beef Group v. Winfrey*, 201 F.3d 680, 686 (5th Cir. 2000).

[5] *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73, 75 (1996); *H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 328 (5th Cir. 2000) ("Even if a court lacks jurisdiction at the time of removal and regardless of whether there was an objection to the removal, the judgment will stand if the court had jurisdiction at the time it entered judgment. If, however, the court lacked jurisdiction both at the time of removal and judgment, the judgment cannot stand.") (citations omitted); *Texas Beef Group*, 201 F.3d at 686.

[6] *See B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. Unit A 1981) ("Where a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect.").

It is true that *Caterpillar v. Lewis*[7] holds that improper removal does not automatically nullify a subsequent federal court judgment when the record establishes that the defect in federal jurisdiction was cured before judgment,[8] but *Caterpillar* merely forgives "untimely compliance" with the removal statute;[9] it still requires that jurisdiction be established by the time judgment was entered.[10] We therefore examine the record of this case to determine whether the facts or allegations in the record establish the existence of subject-matter jurisdiction at the time of removal or, at the latest, at the time of judgment. At the same time, we need not address the denial of the motion to remand if the district court lacked subject-matter jurisdiction.

III

A

We first consider federal question jurisdiction. Federal district courts have jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States."[11] In determining whether a case "arises under

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[7] 519 U.S. 61 (1996).

[8] *Id.* at 64.

[9] *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 43 (1998).

[10] *See Caterpillar*, 519 U.S. at 76-77 ("[I]f, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated. . . . In this case, however, no jurisdictional defect lingered through judgment in the District Court.").

[11] 28 U.S.C. § 1331 (2000).

federal law" we look to whether the "plaintiff's well-pleaded complaint raises issues of federal law."[12]

The general rule for determining whether a case raises a federal question was announced by Justice Holmes in *American Well Works Co. v. Layne & Bowler Co.*[13]: a "suit arises under the law that creates the cause of action."[14] This famous formulation actually serves better to include than to exclude federal cases,[15] however, in that claims created by state law often incorporate federal standards or require the interpretation of federal law. That is, the claim arises from state law but may turn on a question of federal law embedded in the matrix of state law. But *when* this federal question will sustain "arising under" jurisdiction is the question. These cases are not answered by Holmes's formulation. In *Gully v. First National Bank in Meridian*,[16] Justice Cardozo offered one answer: "To bring a case within the [federal question jurisdiction] statute, a right or immunity created by the

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[12] *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 163 (1997) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)). Federal question jurisdiction over a case removed from state court also depends on the well-pleaded complaint rule. *See Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986). "[T]he plaintiff's well-pleaded complaint, not the removal petition, must establish that the case arises under federal law." *Willy v. Coastal Corp.*, 855 F.2d 1160, 1165 (5th Cir. 1988). The burden of establishing jurisdiction rests on the party seeking removal. *See id.* at 1164.

[13] 241 U.S. 257 (1916).

[14] *Id.* at 260.

[15] *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9 (1983).

[16] 299 U.S. 109 (1936).

Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."[17] This was later refined in *Franchise Tax Board*,[18] which insisted that the embedded federal question be substantial.[19] Under *American Well Works*, a complaint creates federal question jurisdiction when it states a claim created by the Constitution or laws of the United States. Under *Gully* and *Franchise Tax Board*, the complaint also creates federal question jurisdiction when it states a cause of action created by state law and (1) a federal right is an essential element of the state claim, (2) interpretation of the federal right is necessary to resolve the case,[20] and (3) the question of federal law is substantial. Ultimately, whether a federal issue embedded in the matrix of a state law claim will support federal question jurisdiction entails a pragmatic assessment of the nature of the federal interest at stake – a view embraced by two giants

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[17] *Id.* at 112 (citations omitted).

[18] *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983).

[19] *Id.* at 13 ("[O]riginal federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims."); *see also Willy v. Coastal Corp.*, 855 F.2d 1160, 1168 (5th Cir. 1988).

[20] Even if a federal right is an element of the state claim, if differing interpretations of the federal right would not affect the outcome of the case, there is no federal question jurisdiction.

in this field.[21] Allstate argues that Howery's complaint states a claim created by federal law. In the alternative, Allstate claims that Howery's reference to federal law creates federal question jurisdiction under *Gully* and *Franchise Tax Board*.

B

Allstate first argues that by mentioning the rules, regulations, and statutes of the FTC, Howery is stating a claim under the federal Fair Credit Reporting Act.[22] A fair reading of the complaint, however, makes clear that it was not invoking the FCRA to state a federal claim. Howery's mention of the FTC rules, regulations, and statutes falls in the middle of a list of alleged Allstate actions that Howery alleged were "further violation[s]" of the Texas Deceptive Trade Practices Act.[23] From its context, it appears that Howery's mention of federal law merely served to describe types of conduct that violated the DTPA, not to allege a separate cause of action under the FCRA. This conclusion is bolstered by the fact that the complaint explicitly alleges that Allstate violated specific sections of the DTPA and Texas Insurance Code and regulations, but makes no explicit mention of any specific federal statute or regulation.

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[21] *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 568-69 (1985); Charles Alan Wright, *Law of Federal Courts* § 17, at 96 (4th ed. 1983).

[22] *See* 15 U.S.C. § 1681 *et seq.* (2000).

[23] Tex. Bus. & Com. Code § 17.41 *et seq.* (2001).

C

Federal jurisdiction is sustainable then only if Howery's DTPA claim requires resolution of a substantial question of federal law. Allstate must show that (1) a federal right is an essential element of Howery's state claim, (2) interpretation of the federal right is necessary to resolve the case, and (3) the question of federal law is substantial. Allstate fails all three prongs of the test.

First, no federal right is an essential element of Howery's DTPA claim. The DTPA forbids a wide range of conduct, prohibiting "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce"[24] and enumerating a long list of specific practices that violate the DTPA.[25] Conduct that violates the FCRA could possibly fall within the broad scope of the DTPA. But a violation of the FCRA is not an element of the DTPA; the statute itself explicitly disclaims such a construction.[26]

Second, interpretation of a federal right is not necessary to this case. Since no federal right is an element of Howery's state claim, no federal right needs to be interpreted. Even if a violation of the FCRA were an element of a DTPA claim, Howery's complaint alleges that the

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[24] Tex. Bus. & Com. Code § 17.46(a).

[25] Tex. Bus. & Com. Code § 17.46(b). The private right of action under the DTPA is limited to recovery for injuries caused by conduct listed in this subsection. *See* Tex. Bus. & Com. Code § 17.50.

[26] "A violation of a provision of law other than this subchapter [the DTPA] is not in and of itself a violation of this subchapter." Tex. Bus. & Com. Code § 17.43.

FCRA violation is one of many alternate grounds for finding a violation of the DTPA. As an alternate theory supporting a single claim, the federal question is not a *necessary* element of the state claim, and thus does not create federal question jurisdiction. The Supreme Court has employed this reasoning in the patent context in *Christianson v. Colt Industries Operating Corp.*[27]

Allstate argues that *Christianson* is no longer the law.[28] We disagree. *Christianson*'s principle that a suit does not create federal question jurisdiction when the federal question appears only in an alternative argument for relief flows directly from the holding in *Gully* that interpretation of the federal question must be necessary to resolve the case. This principle recognizes that *Gully* defines and narrows the class of cases in which there is federal question jurisdiction when a claim arises from state law.[29] An expansive interpretation of the federal question statute to allow federal courts to assert jurisdiction over cases with tangential and inessential federal components would step upon the authority of state courts to decide state law and ignore the capacity of state courts to decide questions of federal law. It would allow a federal tail to wag the state dog. *Franchise Tax Board*

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[27] 486 U.S. 800, 809-810 (1988).

[28] Allstate argues that *Christianson* should be confined to apply only to its specific context in the area of patent law. This court has already rejected such a narrow reading of *Christianson*. *See Willy v. Coastal Corp.*, 855 F.2d 1160, 1170-71 (5th Cir. 1988) (applying *Christianson* to a non-patent law context).

[29] *See Oliver v. Trunkline Gas Co.*, 796 F.2d 86, 88 (5th Cir. 1986) (characterizing *Franchise Tax Board* as describing "narrow exceptions" to the rule of *American Well Works*).

recognized as much with its insistence that the federal question be substantial before a federal court takes jurisdiction over a case stating only state law claims.[30]

Third, for reasons that are now wholly evident, the federal question in this case is not "substantial." The state law issues overwhelm the federal law issues. No federal question jurisdiction exists in this case.

IV

Allstate did not suggest the presence of diversity jurisdiction until almost five years after Howery filed suit; and it never raised the issue before the district court. It is true that subject-matter jurisdiction cannot be created by waiver or consent. It is equally true that federal courts must address jurisdictional questions whenever they are raised and must consider jurisdiction *sua sponte* if not raised by the parties.[31]

The parties have rights to choice of forum. Exercising that right should carry no pejorative cost of "forum shopping." That said, that Allstate did not remove for reason of diversity at the outset was either an inadvertence or a tactical decision. Either way, Allstate is not an attractive beneficiary of a last minute save of jurisdiction. If that circumstance controlled the decision, it is easily answered. But that is not the teaching of *Caterpillar*.[32]

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[30] *See Franchise Tax Board*, 463 U.S. at 13.

[31] *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 546 (5th Cir. 1990).

[32] *See Caterpillar v. Lewis*, 519 U.S. at 75-78.

Rather, our concern is to bring an end in the most efficient way possible to this case, if the federal courts have the power to do so.[33]

The burden of establishing federal jurisdiction rests on the party seeking the federal forum. For diversity jurisdiction, the party asserting federal jurisdiction must "distinctly and affirmatively allege [ ]" the citizenship of the parties.[34] "Failure adequately to allege the basis for diversity jurisdiction mandates dismissal."[35] Allstate thus bears the burden of establishing diversity; if it fails to meet that burden, we cannot presume the existence of federal jurisdiction.

Allstate has never pleaded diversity of the parties. It suggested that the parties were diverse for the first time at oral argument before this court. We nonetheless will overlook Allstate's failure to plead diversity if Allstate can identify allegations and evidence in the record demonstrating diversity. This court allows parties to cure

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[33] *See id.* at 77 ("To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.").

[34] *Stafford*, 945 F.2d at 804 (quoting *McGovern v. American Airlines, Inc.*, 511 F.2d 653, 654 (5th Cir. 1975)); *see also Whitmire v. Victus Limited t/a Master Design Furniture*, 212 F.3d 885, 887 (5th Cir. 2000); *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1259 (5th Cir. 1988) (noting that the rule that citizenship must be distinctly and affirmatively alleged requires "strict adherence").

[35] *Stafford*, 945 F.2d at 805.

"technical defects or failure to specifically allege the citizenship of a party . . . in the appellate courts,"[36] but only when the amendment "would do nothing more than state an alternative jurisdictional basis for recovery *upon the facts previously alleged.*"[37] In other words, when the record establishes the diversity of the parties, but the party asserting federal jurisdiction has failed to specifically plead that the parties are diverse, we allow that party to amend its pleadings to correct for their technical deficiency.[38] Yet, if there is no evidence of diversity on the record, we cannot find diversity jurisdiction, and we must dismiss the action for lack of jurisdiction.[39]

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[36] *Whitmire v. Victus Limited t/a Master Design Furniture*, 212 F.3d 885, 888 (5th Cir. 2000).

[37] *Id.* (emphasis added and internal quotation marks omitted).

[38] *See Stafford*, 945 F.2d at 805-06; 28 U.S.C.A. § 1653 (2000).

[39] *See Stafford*, 945 F.2d at 806. Allstate asserted at oral argument that our cases allow parties to present evidence in support of jurisdictional claims on appeal. This is incorrect. As we have explained above, facts establishing jurisdiction must have been alleged at the time judgment was entered. The case cited by Allstate, *Whitmire*, 212 F.3d at 888, says as much. *See also Caterpillar*, 519 U.S. at 76-77; *cf. Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254, 1260 (5th Cir. 1988) (remanding to district court to rule on the existence of diversity jurisdiction in the first instance, given that the record was unclear). Of course, prior to judgment, a party may amend its pleadings to allege omitted jurisdictional facts. *See, e.g., D.J. McDuffie, Inc. v. Old Reliable Fire Ins. Co.*, 608 F.2d 145, 146 (5th Cir. 1979) (affirming a finding of diversity jurisdiction when the defendant, prior to judgment, amended its removal petition to specifically allege the citizenship of the parties).

Allstate argues that the record establishes that Howery and Allstate are diverse. It points to the federal pretrial order; to Allstate's answers to Howery's amended complaints in federal court; and to Allstate's Certificate of Counsel with Notice of Disclosure of Interested Persons, which it filed with its Notice of Removal.

The federal pretrial order makes no statements about the citizenship, place of incorporation, or principal place of business of Allstate. It merely states that Howery is a resident of Houston, Texas, and that Allstate has subjected itself to the personal jurisdiction of the court.

Allstate's answers to Howery's federal complaints specifically deny the allegations of Howery's complaints that Allstate "is a domestic insurance carrier." They admit the allegation that Howery is a citizen of Texas. They make no other statements relevant to diversity jurisdiction.

Allstate's Certificate of Counsel with Notice of Disclosure of Interested Persons lists Allstate as an interested person and provides an Illinois address.[40] It states that Allstate was formed and incorporated under the laws of Illinois. It also notes that "[t]he Texas Department of Insurance characterizes Allstate Insurance Company as a foreign, stock, casualty and property insurance company." It makes no other statements relating to jurisdiction.

As a corporation, Allstate is a citizen of two states: its state of incorporation, and the state of its principal place

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[40] It also lists Howery and provides a Texas address.

of business.[41] The portions of the record cited by Allstate establish that Howery is a citizen of Texas and that Allstate is incorporated in Illinois, and thus a citizen of Illinois. This is not the end of the inquiry, however. Diversity of parties must be complete,[42] and therefore Allstate must establish that Allstate's principal place of business is not Texas.

Determining a corporation's principal place of business is a factual inquiry dependent on a number of factors. The "total activity" test that this circuit applies is expounded upon at length in *J.A. Olson Co. v. City of Winona*.[43] This test is a synthesis of the "place of activity" and "nerve center" tests some courts have employed.[44] Essentially, "[w]e look to the nature, location, importance, and purpose of a corporation's activities and the degree to which those activities bring the corporation into contact with the local community."[45]

The record in this case lacks such evidence of Allstate's principal place of business. The portions of the record cited by Allstate prove only (1) that Allstate has a mailing address in Illinois and (2) that Allstate is a "foreign" insurance company, as designated by the Texas Department of Insurance. Unfortunately for Allstate, the

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[41] *See* 28 U.S.C. § 1332(c)(1) (2000).

[42] *See Lowe v. Ingalls Shipbuilding, A Div. of Litton Systems, Inc.*, 723 F.2d 1173, 1177 (5th Cir. 1984); *see also Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

[43] 818 F.2d 401, 404-10 (5th Cir. 1987).

[44] *See id.* at 406, 409.

[45] *See Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164 (5th Cir. 1998).

designation "foreign" by the Texas Department of Insurance merely indicates that the company was incorporated in another state.[46] From the record, we have no inkling as to Allstate's principal place of business.

Whether for tactical reasons or out of mere inadvertence, Allstate has failed to plead or to present evidence of diversity of the parties at any point in this case's odyssey through state and federal court. The record fails to establish federal jurisdiction at either the time of removal or at the time of judgment.

V

Howery's tenth amended complaint does not raise a federal question that will support federal question jurisdiction. The record does not contain allegations or evidence of diversity of the parties. We then lack jurisdiction over this case and we need not address Howery's challenge to the district court's refusal to remand. We VACATE the judgment of the district court and REMAND

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[46] *See* Tex. Ins. Code art. 3.01 § 6 (defining "foreign company"). In our own review of the record, we find indirect *disavowals* of diversity jurisdiction by Allstate. In its removal-related motions, Allstate repeatedly asserts that there was no basis for removal until Howery filed his tenth amended complaint. This claim necessarily implies the absence of diversity jurisdiction. By taking this position, Allstate avoided a remand to state court based on its failure to remove the case within thirty days of the filing of Howery's original complaint. *See* 28 U.S.C. § 1446(b) (2000) (prohibiting removal more than thirty days after the filing of a pleading that states a removable case).

this case to the district court with instructions to DISMISS the case for lack of jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ERROL P. HOWERY Plaintiff,	§ § §	
VS.	§	CIVIL ACTION NO.
ALLSTATE INSURANCE COMPANY	§ §	H-98-2741
Defendant	§	

FINAL JUDGMENT

At the close of a trial from June 7-15, 1999, the jury in the above referenced action found that Plaintiff Errol Howery intentionally set or directed someone to set a fire that occurred around 2:00 a.m. on March 19, 1995 at his townhouse at 12239C Wildpine in Houston, Texas. Accordingly, the Court

ORDERS that FINAL JUDGMENT shall be entered in favor of Defendant Allstate Insurance Company against Plaintiff Errol Howery. Plaintiff shall take nothing and shall bear all costs of court.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 19th day of July, 1999.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20878

ERROL P. HOWERY,

Plaintiff-Appellant

versus

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee

Appeal from the United States District Court
For the Southern District of Texas, Houston

(Filed Apr. 23, 2001)

Before KING, Chief Judge, and HIGGINBOTHAM and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing are DENIED. There is a point at which the court must decline further opportunities to correct a patent jurisdictional defect. We have passed that point. As suggested by appellant, the remand to the district court is with instruction that the case be remanded to the state court from which it was removed.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20878

ERROL P HOWERY

Plaintiff-Appellant

v.

ALLSTATE INSURANCE COMPANY

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed Feb. 28, 2001)

ORDER:

IT IS ORDERED that appellee's motion to supplement the record on appeal is granted to the extent it includes materials in the record before the trial court but denied with respect to materials not presented to the trial court. *See* Fed. R. App. P. 10(e)

/s/ Patrick E. Higginbotham
PATRICK E.
HIGGINBOTHAM
UNITED STATES CIRCUIT
JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20878

ERROL P HOWERY

Plaintiff-Appellant

v.

ALLSTATE INSURANCE COMPANY

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed Apr. 23, 2001)

ORDER:

IT IS ORDERED that the motion of appellee for leave to file amended notice and petition of removal is denied.

IS IT FURTHER ORDERED that the motion of appellee to supplement the record as to jurisdictional facts which existed at the time of judgment is denied.

/s/ Patrick E. Higginbotham
PATRICK E.
HIGGINBOTHAM
UNITED STATES CIRCUIT
JUDGE